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No. 92-565

In The

Supreme Court of the United States

October Term, 1992

BAGGEN TUG & BARGE CO., INC., and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' REPLY TO RESPONDENT RAINIER NATIONAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM G. ROYCE
Counsel of Record
1029 W. Third Ave.
Suite 510
Anchorage, Alaska 99501
(907) 279-6595

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Baggen Tug & Barge Co., Inc. and Samson Tug & Barge Co., Inc., Petitioners herein (hereinafter referred to as "Samson"), file this reply brief in order to correct, fairly state and analyze important issues of law and fact raised in Respondent Rainier National Bank's Brief in Opposition.

ARGUMENT

I. The Petition Presents Important Questions Requiring Review

A. The Note and Vessel Hire Agreements are not Integrated.

Rainier National Bank (hereinafter "Rainier") says that the Ninth Circuit's decision does not conflict with this Court's decisions in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919), recognizing the validity of oral maritime contracts like Samson's vessel hire contract with Alaska Pulp Corp. (hereinafter APC) Rainier makes three arguments which will be discussed below:

> "1. The Ninth Circuit properly enforced an express contractual choice of law;"

Respondent's Brief at 11-16.

Rainier argues that the parties freely contracted for application of a particular state's law. Here, however, the only choice of laws provision is found in a promissory note between Samson and Rainier. This provision required that the note be construed and enforced according to the laws of the State of Washington. There is no evidence or basis in the record to argue that Samson expressly and freely chose to apply the law of the State of Washington to an entirely separate oral maritime contract it enjoyed with Rainier's beneficiary, APC. To the contrary, Rainier's Trust Agreement with its beneficiary APC, expressly recognized other agreements between Samson and APC and excluded them from the trust estate:

> 1.11 The Trustee has been notified that there may have been other and previous dealings between the Debtor, other parties, and/or [APC]. It is understood and agreed that the trust estate shall be limited to the Note of Debtor and Samson and the First Preferred Ship Mortgage on the Vessel; and any rights granted, or duties imposed, by any other agreements to which Debtor may be a party shall be excluded from the trust.

Pet. App. 29, Trust Agreement.

Critically, neither the Ninth Circuit nor Rainier in its brief in its opposition to this Petition for Writ of Certiorari advance a single argument explaining why this Trust Agreement provision should be disregarded. By this Trust Agreement, Rainier specifically contracted that Samson's other agreements with APC would be excluded from Rainier's responsibilities, which would be limited to the note of the debtor and the first preferred ship's mortgage. A choice of laws provision contained within the note of the debtor cannot, therefore, extend to Samson's other oral contracts with Rainier's beneficiary APC.

B. The Vessel Hire Agreement is Consistent with the Note.

> "2. The Ninth Circuit properly applied a State law rule that is consistent with the comparable general federal maritime law;"

Respondent's Brief at 11-16.

Rainier's second argument that "the Ninth Circuit properly applied a State law rule that is consistent with the comparable general federal maritime rule" misstates

Samson's position below and in its Petition for Writ of Certiorari. Rainier argues:

> [B]aggen is attempting to avoid fulfilling a written unqualified promise to pay by proving – through extrinsic (*parol*) evidence – that in fact the promise was qualified, by the limitation that it need be met only through funds from a particular source (specifically, towing fees paid by APC for services rendered by Baggen using the GEORGEANN). It is hornbook law that such claims are barred by the integrated agreement rule. . . .

Respondent's Brief at 13.

Samson does not seek to vary or contradict the terms of the written contract between Samson and Rainier. Samson seeks only to enforce through setoff its claims against the trustee Rainier's beneficiary APC. The law clearly allows this result under the *Restatement (Second) of Agency* § 371 and *Restatement (Second) of Trusts* § 329.

Samson is entitled to setoff against the trustee's and agent's claims the damages Samson has suffered by virtue of its beneficiary and principal's breach of a separate oral maritime contract to profitably employ the vessel Samson constructed. This remedy of setoff is particularly appropriate as APC made two contracts with Samson: (1) an oral agreement to employ a vessel, and (2) a loan agreement through a trustee. It is unfair for APC through its trustee to fully collect the construction loan while avoiding its obligations under the oral maritime contract to employ the vessel constructed. The decision below has allowed this result.

C. The Vessel Hire Agreement is Subject to Admiralty Jurisdiction.

> "3. The Ninth Circuit decision does not concern a contract traditionally within the jurisdiction of the admiralty courts."

Respondent's Brief at 11-16.

Rainier defines the "contract" as the note and preferred marine mortgage. The contract Samson seeks to enforce, however, is the oral contract for hire of a vessel. This contract is certainly traditionally within the jurisdiction of admiralty courts and will be recognized and enforced notwithstanding its oral nature. *Kossick*, 365 U.S. 731, and *Union Fish Co.*, 248 U.S. 308. The obligations in the written financing contract have been performed or reduced to judgment. Samson remains, however, entitled to setoff damages it has suffered by reason of APC's breach of its oral contract to hire the O/S GEORGEANN under the principles of the *Union Fish Co.* and *Kossick* decisions which protect and enforce rights flowing from oral maritime contracts.

II. The Admiralty Issues Presented in this Petition for Writ of Certiorari Were Properly Presented Below.

Rainier argues that the principal admiralty issues raised by this Petition for Writ of Certiorari, i.e., the enforceability of oral maritime contracts notwithstanding contrary state law, were not fully presented below. Rainier is incorrect.

It is true that Samson initially urged that Alaska State law would apply to the oral contract between Samson

and APC under the test set out in the *Restatement (Second) Conflict of Laws* § 188. Rainier, however, raised in its appellee's brief before the Ninth Circuit the notion that admiralty law would apply to Samson's claims:

> Baggen's conflicts of law exercise ignores this policy. While the system of admiralty may be "incomplete and less than perfect," *id.*, the issues raised by Baggen's defenses and counterclaims do not fall within the system's gaps . . . Admiralty has its own integrated agreement (parol evidence rule). *See, e.g., Har-Win, Inc. v. Consolidated Grain & Barge Co.*, 794 F.2d 985, 987 (5th Cir. 1986). Admiralty may be more willing to enforce oral agreements than some jurisdictions with a Statute of Frauds. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 734, n.4 (1961). In short, admiralty has rules governing the substantive validity of Baggen's defenses and counterclaims. . . .

Brief of Appellee Rainier National Bank before the Ninth Circuit at 25.

In its reply brief filed before the Ninth Circuit, Samson concurred:

> To the extent that the Samson/APC agreement constitutes a contract for hire of a vessel, it's maritime nature may lead this court to apply the law of admiralty. [cit.om.] If this is done, the agreement for hire, although oral, is fully enforceable.
>
> Under the law of admiralty, this oral contract would be enforceable in the face of a state Statute of Frauds. *Mayer Bolt Works, Inc. v. Bright Marine Basin, Inc.*, 265 F.Supp. 352 (E.D.N.Y. 1966), *Union Fish Co. v. Erickson*, 248 U.S. 308

(1919). In *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the Supreme Court held:

> "For it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law."

Reply Brief of Appellants before the Ninth Circuit at 14-15.

Rainier argued below that admiralty law, including *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), would apply to Samson's contract claims were it not for the choice of laws provision contained in Samson's promissory note. Thus, both Rainier and Samson agreed below that federal admiralty law would ordinarily apply to the oral contract Samson had with APC. Rainier went on to argue, as it does here, that because the parties chose to adopt Washington State law in the Rainier/Samson note they adopted Washington State law for construction and enforcement of the Samson/APC vessel hire agreement. As shown above, however, this choice of laws provision applies only to the promissory note and has no application to the oral contract between Samson and APC for the hire of the vessel. The admiralty arguments presented by this Petition for Writ of Certiorari were properly raised below.

III. Petitioners' Claims Are Not Precluded by Any Alternative Theories.

Samson established below factual evidence that its original agreement with APC obligated APC to finance construction of the O/S GEORGEANN pursuant to a no interest loan. Samson's evidence included the affidavit of

Doug Theno, APC's Logging Manager, that no interest loans to contractors were a customary business practice of the Japanese firm and that he, in fact, agreed to provide Samson with a no interest loan for tug construction. (Pet. App. 21, 22, 23.) Samson's President George Baggen confirms this original agreement and a subsequent modification wherein the loan would bear interest at ten percent. (Pet. App. 36, 37, 38.)

Samson has argued unsuccessfully that the change from a no interest loan to a ten percent loan was accomplished through duress, as it occurred after Samson had commenced to construct an expensive vessel. Samson has not sought further review on this particular issue. Rainier argues in its brief opposing Samson's Petition for Certiorari that Samson's evidence of duress relative to the terms of vessel financing prevents Samson from seeking enforcement of the agreement to employ the O/S GEORGEANN:

> [B]aggen submitted evidence that it acquiesced in the substitution of the written "with interest" loan for the oral "without interest" one, and that evidence waives the factual predicate for Baggen's present claim that the parties entered into the First Preferred Ship Mortgage relationship with a continuing collateral arrangement that limited Baggen's obligation to pay to a specific source of funds.

Rainier's Brief In Opposition at 19.

This argument again misstates Samson's position, as Samson seeks not to vary the written note by engrafting a source of payment provision, but rather to obtain a setoff for damages flowing from APC's breach of its oral maritime contract to hire Samson's vessel. Samson has stated this

position so often and so clearly that Rainier's continued misstatement of Samson's position now appears calculated.[1]

IV. Samson's Appeal Following Entry of Final Judgment Is Timely As to All Prior Orders.

In the absence of an express determination and certification of final judgment pursuant to Rule 54(b), F.R.C.P.,

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[1] In its opening brief before the Ninth Circuit, Samson argued:

> Samson's proof of its oral contract with APC does not violate the Parol Evidence Rule. . . . Contract claims of Samson relate to breach of APC's promise to provide work at rates sufficient to cover operating costs, repay debt, and net a profit. Evidence supporting these claims does not vary or contradict a loan agreement which, pursuant to its trust terms, specifically excludes such "other and previous dealings between the debtor, other parties, and/or [APC]."

Id. at 28.

In its Reply Brief filed at the Ninth Circuit, Samson stated:

> Thus, even if Rainier is allowed to enforce the note as written, Samson still has a contract claim against APC based on APC's failure to utilize Samson's vessels at levels and rates sufficient to cover expenses, debt and net a profit. This claim includes as damages any sums held due Rainier and may be setoff against Rainier.

Id. at 13, 14.

Identical arguments were set out in Samson's Petition for Writ of Certiorari at pages 13 and 14. Samson has consistently asserted a right to setoff damages occasioned by APC's breach of the oral maritime contract to hire a vessel notwithstanding Rainier's full enforcement of the promissory note as written.

Petitioners may raise and determine in this appeal all orders preceding final judgment. *Frank Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc.*, 776 F.2d 1414 (9th Cir. 1985). As the Ninth Circuit recognized, Samson does not seek to set aside the foreclosure sale of the O/S GEORGEANN, but rather to challenge the resulting deficiency judgment and assert a setoff. (Pet. App. A-5.) Samson filed a timely appeal to the final judgment entered herein. (Pet. App. A-9-A-11.)

V. Conclusion.

Samson's Petition for Writ of Certiorari raises the substantial issues of ensuring the enforcement of oral maritime contracts and ensuring that this Court's decisions are followed. For these reasons, the Writ of Certiorari should issue.

Respectfully submitted,

WILLIAM G. ROYCE
Counsel of Record
1029 W. Third Ave.
Suite 510
Anchorage, Alaska 99501
(907) 279-6595

Attorney for Petitioners